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From 'Margin of Discretion' to the Principles of Universality and Non-Discrimination: A Critical Assessment of the 'Public Morals' Jurisprudence of the Human Rights Committee

Ignatius Yordan Nugraha*

This article is intended to critically analyse the 'public morals' jurisprudence of the Human Rights Committee (HRC). Under the International Covenant on Civil and Political Rights, 'protection of public morals' can be invoked as a legitimate aim to limit various rights, such as the right to freedom of religion and freedom of expression. In this regard, the HRC has held that 'public morals' must be derived from many different traditions, and that limitation of rights based on public morals must be understood in light of the principles of universality of human rights and non-discrimination. However, this research has found that the HRC's jurisprudence on public morals contains two main problems. First, it remains unclear when a moral standard can be considered as deriving from 'many different traditions'. Second, the HRC's interpretation is also not supported by the application of the general rule of interpretation.

1. Introduction

Under the International Covenant on Civil and Political Rights (ICCPR), 'protection of public morals' is recognised as a permissible ground to limit various rights, such as the right to freedom of religion, the right to freedom of expression, and the right to assembly and association.[1] With regard to freedom of religion, for example, Article 18(3) of the ICCPR enshrines that '[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect *public* (…) *morals* (…).'[2]

Furthermore, although Article 17 on the right to privacy and Article 26 on the autonomous right to non-discrimination do not contain any limitation clause, the Human Rights Committee (HRC) has held that these rights are not absolute. With regard to the right to privacy,

* Ignatius Yordan Nugraha is a PhD Research Fellow at Hasselt University. This study was supported by the Special Research Fund (BOF) of Hasselt University (grant number BOF20OWB11).

[1] Ryan Thoreson, 'The Limits of Moral Limitations: Reconceptualizing "Morals" in Human Rights Law' (2018) 59 Harvard International Law Journal 197, 203; Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (CUP 2002) 197.

[2] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 18(3), emphasis added.

Article 17 stipulates that '[n]o one shall be subjected to *arbitrary* or unlawful interference with his privacy, family, home or correspondence (…)'.[3] The HRC has interpreted the term 'arbitrary' as requiring that an interference with privacy must be 'reasonable'. The HRC then explained that 'reasonable' means the interference has to be 'necessary in the circumstances of any given case' and 'proportionate to *the end sought*'.[4] Moreover, with regard to Article 26, the HRC has clarified that not all distinctions can be considered as discrimination as long as the distinctions are 'justified on reasonable and objective grounds, *in pursuit of an aim that is legitimate under the Covenant*.'[5] Since 'protection of public morals' is recognised as one of the legitimate aims of the ICCPR, it can be inferred that 'the end sought' and 'an aim that is legitimate under the Covenant' may also include this ground.

'Protection of public morals' itself remains undefined in the ICCPR.[6] From a philosophical point of view, this term may imply that states may arrest moral change in order to protect itself from a so-called moral corruption, or that states are entitled to enforce majoritarian moral conceptions in order to eradicate what the majority considers to be immoral or evil.[7] However, from a legal perspective, the HRC has not defined — perhaps deliberately — what 'public morals' means.[8] Manfred Nowak and Tanja Vospernik have even called it 'the least clear and most controversial of all the legitimating grounds for justifying restrictions'.[9]

It is true that the HRC has clarified that 'public morals' derive from 'many social, philosophical and religious traditions'.[10] The HRC has also held that 'public morals' cannot be inferred only from one tradition and need to be understood in light of the universality of human rights and the principle of non-discrimination.[11] However, the HRC has not thoroughly justified how it reached such a universalistic reading. The HRC also has not explained what this

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[3] Ibid, art 17(1), emphasis added.
[4] *Toonen v Australia* (1994) UN Doc CCPR/C/50/D/488/1992, para 8.3, emphasis added. See also HRC, 'General Comment 16: Article 17 (Thirty-second session, 1988)' (1994) UN Doc HRI/GEN/1/Rev.1, 21-22 para 4.
[5] *John K. Love et al. v. Australia* (2003) UN Doc CCPR/C/77/D/983/2001, para 8.2, emphasis added. See also HRC, 'General Comment 18: Non-discrimination (Thirty-seventh session, 1989)' (1994) UN Doc HRI/GEN/1/Rev.1, 28 para 13; Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (OUP 2019) 342
[6] Thoreson (n 1) 199.
[7] See Joel Feinberg, *The Moral Limits of the Criminal Law, Vol. 4: Harmless Wrong-Doing* (OUP 1988) 39, 43.
[8] Thoreson (n 1) 216.
[9] Manfred Nowak and Tanja Vospernik, 'Permissible Restrictions on Freedom of Religion or Belief' in Tore Lindholm, W. Cole Durham, Jr. and Bahia G. Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Springer 2004) 159. See also Noel Villaroman, *Treading on Sacred Grounds: Places of Worship, Local Planning and Religious Freedom in Australia* (Brill 2015) 263-65.
[10] See HRC, 'General Comment 22: Article 18 (Forty-eighth session 1993)' (1994) UN Doc HRI/GEN/1/Rev.1, 37 para 8; HRC, 'General Comment 34: Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 32.
[11] Ibid.

interpretation would entail with regard to the extent states may invoke 'protection of public morals' to limit various rights.

Against this backdrop, this article is intended to critically assess the 'public morals' jurisprudence of the HRC from a legal positivist perspective. For this purpose, I have identified and analysed cases in which the HRC has assessed whether a limitation is justified by the aim of 'protection of public morals', and I have also delved into General Comments and Concluding Observations of the HRC in which the issue of 'public morals' was discussed. In the process, I have found that the HRC's jurisprudence on 'public morals' has two main problems. First, it is rather uncertain how a moral standard can be considered as deriving from 'many different traditions' in order to qualify as 'public morals'. Second, the HRC's jurisprudence also lacks support from the application of the general rule of interpretation under the Vienna Convention on the Law of Treaties (VCLT), since the resulting interpretation rather indicates that 'public morals' do not have to derive from many different traditions.

Based on the application of the VCLT, this article concludes that 'public morals' means the subjective standards of what a society or people in general considers to be right or wrong. It should be noted, however, that this article is not intended to defend cultural relativism or particularism. This article also does not advocate for a wide margin of appreciation for states in the matter of 'public morals'. At the same time, there might be concerns that if 'public morals' is not read in a universalistic manner, it might excuse many violations or even be abused to justify discrimination and undercut pluralism. To address these fears, this research suggests that the HRC should rely on a robust necessity test, and the HRC should also assert that all limitation grounds must be interpreted in light of the accessory right to non-discrimination under Article 2(1) of the ICCPR.

The article itself is structured as follows. Section 2 tracks the evolution of the concept of 'public morals' in the jurisprudence of the HRC. Subsequently, in Section 3, I explain why the HRC's jurisprudence of 'public morals' remains obscure from a legal perspective. Section 4 then applies the general rule of interpretation to the term 'public morals' to demonstrate that the HRC's jurisprudence is not supported by the VCLT. Finally, since not defining 'public morals' in a universalistic manner might raise fears that it could lead to unfettered discretion and discriminatory outcome, I argue in Section 5 that this fear can be assuaged through the application of a robust necessity test and also by requiring all limitation grounds to be interpreted in light of Article 2(1) of the ICCPR.

2. The Evolution of the HRC's 'Public Morals' Jurisprudence

In the beginning, the HRC seemed to have accommodated particularist conceptions of human rights by refraining from imposing a universal standard of 'public morals' and allowing member states to define the term in their own way.[12] This was demonstrated in the first case in which the issue of 'public morals' was considered by the HRC, namely *Leo Hertzberg et al v Finland* in 1985.

The case was concerned with restrictions on speech concerning homosexuality that were caused by the existence of paragraph 9(2) chapter 20 of the Finnish Penal Code, which prohibited 'public encouragement of indecent behaviour between persons of the same sex'.[13] In response to the allegation that these restrictions violated the right to freedom of expression under Article 19(2) of the ICCPR, the Finnish government invoked the 'protection of public morals' ground as enshrined under Article 19(3) and asserted that the Penal Code provision was intended 'to reflect the prevailing moral conceptions in Finland as interpreted by the Parliament and by large groups of the population.'[14]

This argument was accepted by the HRC. It held that 'public morals differ widely' and that '[t]here is no universally applicable common standard.'[15] The HRC then asserted that 'a certain margin of discretion must be accorded to the responsible national authorities.'[16] The use of the term 'margin of discretion' itself was, according to Ludovic Hennebel, unprecedented and seemed to have been borrowed from the concept of margin of appreciation in the European Court of Human Rights (ECtHR).[17] Eventually, because of the 'margin of discretion' afforded to Finland in the matter of 'public morals', the HRC found that there was no violation of Article 19(2) of the ICCPR.

Viljam Engström commented that the HRC's 'margin of discretion' dictum in *Leo Hertzberg* reflects the Siracusa Principles on the Limitation and Derogation Provisions in the

[12] Sarah Joseph, Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, OUP 2013) 48, 624-25. See also Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 2005) 466; Lorenz Langer, *Religious Offence and Human Rights: The Implications of Defamation of Religions* (CUP 2014) 108.
[13] *Leo Hertzberg et al. v. Finland* (1985) UN Doc CCPR/C/OP/1, para 2.1-2.6.
[14] Ibid para 6.1.
[15] Ibid para 10.3.
[16] Ibid.
[17] See Ludovic Hennebel, *La jurisprudence du Comité des droits de l'homme des Nations Unies: Le Pacte international relatif aux droits civils et politiques et son mécanisme de protection individuelle* (Editions Nemesis ASBL 2007) 274-75 para 341.

International Covenant on Civil and Political Rights (thereafter Siracusa Principles).[18] These non-binding principles were drafted by 31 experts of international law in 1984 and were intended to reflect the state of international law at that time.[19] The principles state that public morality 'varies over time and from one culture to another'.[20] While states have 'a certain margin of discretion', they 'shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.'[21] Furthermore, the principles hold that '[t]he margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant.'[22] At the same time, there is one significant difference between the Siracusa Principles and *Leo Hertzberg*: in the latter, the HRC has completely deferred the assessment of whether the restriction based on 'public morals' was 'essential'.

Subsequent General Comments of the HRC, however, have demonstrated a departure from *Leo Hertzberg*.[23] In 1993, the HRC issued General Comment 22 on the right to freedom of thought, conscience or religion under Article 18 of the ICCPR. While the HRC still had not defined the exact meaning of the term 'public morals', it went beyond the Siracusa Principles by declaring that 'the concept of morals derives from many social, philosophical and religious traditions.'[24] Consequently, in the HRC's view, 'limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.'[25]

The HRC later reiterated this observation in General Comment 34 on the right to freedom of opinion and expression (2011), and it further added a statement that '[a]ny such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.'[26] Vincent Vleugel interpreted this statement as implying that when there is a conflict between morals, which are deemed to be bound to culture, and the universality of

[18] Viljam Engström, 'Deference and the Human Rights Committee' (2016) 34 Nordic Journal of Human Rights 73, 80-81.
[19] Commission on Human Rights, 'Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights' (1984) UN Doc E/CN.4/1984/4, 2.
[20] Ibid 5 para 27.
[21] Ibid.
[22] Ibid 5 para 28.
[23] Joseph & Castan (n 12) 48-49, 625; Hossein Esmaeili, Irmgard Marboe, Javaid Rehman, *The Rule of Law, Freedom of Expression and Islamic Law* (Bloomsbury 2017) 55; Michael O'Flaherty, 'Sexual Orientation and Gender Identity' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2018) 300.
[24] General Comment 22 (n 10) para 8.
[25] Ibid.
[26] General Comment 34 (n 10) para 32.

human rights, the latter will take precedence.[27] Furthermore, in this General Comment, the HRC made the following observation:

> The Committee reserves to itself an assessment of whether, in a given situation, there may have been circumstances which made a restriction (…) necessary. In this regard, the Committee recalls that the scope of this freedom is not to be assessed by reference to a "margin of appreciation" and in order for the Committee to carry out this function, a State party, in any given case, must demonstrate in specific fashion the precise nature of the threat to any of the enumerated grounds listed (…).[28]

Therefore, in General Comment 34, the HRC has not only endorsed a universalistic reading of 'public morals', but also explicitly repudiated the notion of margin of discretion or appreciation. Subsequently, in General Comment 37 on the right to freedom of assembly (2020), the HRC added another qualifier that restrictions based on public morals also be understood in light of the principle of 'pluralism',[29] although the HRC did not fully clarify what this entails in practice.

A universalistic reading of public morals has also been reiterated several times in the HRC's Concluding Observations.[30] For instance, in its Concluding Observation on Iraq in the context of LGBT rights, the HRC held that '[w]hile the Committee observes the diversity of morality and cultures internationally, it recalls that they must always be subject to the principles of universality of human rights and non-discrimination.'[31] Similarly, in its Concluding Observation on Mauritania in the context of the death penalty for homosexual acts, the HRC asserted that '[t]he Committee respects the cultural diversity and moral principles of all countries, but recalls that these always remain subordinate to the principles of the universality of human rights and non-discrimination.'[32]

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[27] Vincent Willem Vleugel, *Culture in the State Reporting Procedure of the UN Human Rights Treaty Bodies: How the HRC, the CESCR and the CEDAWCee Use Human Rights as a Sword to Protect and Promote Culture, and as a Shield to Protect against Harmful Culture* (Intersentia 2020) 166.

[28] General Comment 34 (n 10) para 36. See also *Länsman et al. v. Finland* (1994) UN Doc CCPR/C/52/D/511/1992, para 9.4.

[29] HRC, 'General Comment No. 37 (2020) on the Right of Peaceful Assembly (Article 21)' (2020) UN Doc CCPR/C/GC/37, para 46.

[30] Vleugel (n 27) 166-168.

[31] HRC, 'Concluding Observations on the Fifth Periodic Report of Iraq' (2015) UN Doc CCPR/C/IRQ/CO/5, para 11. See also HRC, 'Concluding Observations Adopted by the Human Rights Committee at its 105th Session, 9-27 July 2012: Maldives' (2012) UN Doc CCPR/C/MDV/CO/1, para 8; HRC, 'Concluding Observations on the Initial Report of Turkey Adopted by the Committee at its 106th Session (15 October - 2 November 2012)' (2012) UN Doc CCPR/C/TUR/CO/1, para 10; HRC, 'Concluding Observations on the Seventh Periodic Report of Ukraine' (2013) UN Doc CCPR/C/UKR/CO/7, para 10.

[32] HRC, 'Concluding Observations on the Initial Report of Mauritania' (2013) UN Doc CCPR/C/MRT/CO/1, para 8.

In the case law of the HRC, the departure from *Leo Hertzberg* was demonstrated in the case of *Toonen v Australia* (1994).[33] In order to defend criminalisation of homosexual acts, Tasmania invoked the ground of 'protection of public morals'. In response, the HRC stressed that it cannot accept the argument that public moral issues are exclusively within the domain of member states.[34] In the HRC's view, such an interpretation 'would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy.'[35] Thus, the HRC has rejected a claim of protection of public morals that was only based on one particular conception.

The HRC then proceeded with the examination of whether the restriction was 'necessary' to achieve the aim that was sought. It observed that in Australia, homosexual acts were no longer criminalised except in Tasmania. The HRC also found that even in Tasmania itself there was no consensus with regard to whether homosexual acts should be decriminalised. Furthermore, the Tasmanian authorities had not prosecuted homosexual acts for years. Therefore, the HRC concluded that the criminalisation of homosexual acts was not necessary for the protection of morals in Tasmania and thus violated Article 17 on the right to privacy.[36]

As observed by Holning Lau, the HRC in *Toonen* can be regarded as having 'expressly dismissed cultural relativism', since they refused to accept Tasmanian public morals as a valid limitation ground.[37] At the same time, the HRC also did not invoke a universalistic reading public morals to repudiate Tasmania's argument. Instead, it relied on a sort of *reductio ad absurdum* that leaving public morals within the exclusive domain of states could excuse many potential violations. Nevertheless, *Toonen* still constituted a departure from *Leo Hertzberg*, as

[33] *Toonen v Australia* (n 4). See also Laurence R Helfer, Alice M Miller, 'Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence' (1996) 9 Harvard Human Rights Journal 61, 74, in which it was argued that 'the more searching analysis in *Toonen* accurately reflects the current perspective of the Committee and suggests that *Hertzberg* might have been decided differently today. This theory of reconciling the cases holds out the promise of a Committee that will not avoid adjudicating contentious questions of interpretation under the ICCPR, including those that affect the public and private lives of lesbians and gay men.' Cf. Thoreson (n 1) 210, who also observed that 'an equally plausible explanation is that the ICCPR attaches a moral limitation to the freedom of expression at issue in *Hertzberg*, while it does not attach any such limitation to the right to privacy at issue in *Toonen*. Under this reading, *Toonen* said little about when and how moral provisions can justify restrictions on human rights, particularly where public expressions of sexuality are concerned.' Nevertheless, as will be discussed below, the *Leo Hertzberg* dictum will be effectively overturned in subsequent cases concerning freedom of expression in the context of LGBT rights.

[34] *Toonen v Australia* (n 4) para 8.6.

[35] Ibid.

[36] Ibid.

[37] Holning Lau, 'Sexual Orientation: Testing the Universality of International Human Rights Law' (2004) 71 The University of Chicago Law Review 1689, 1700.

the HRC had refrained from invoking 'margin of discretion' in interpreting the requirement of 'public morals'.

Eventually, the HRC explicitly endorsed a universalistic reading of public morals in *Fedotova v Russia* (2012).[38] In this case, Russia sought to justify the administrative prohibition of 'gay propaganda' in Ryazan by stating that it was intended to protect, *inter alia*, public morals. The HRC responded by reiterating its observation in General Comment 34:

> In this respect, the Committee recalls (…) that "'the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations … for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination".[39]

A universalistic reading of 'public morals' was further cemented in *Kirill Nepomnyashchiy v Russia* (2018), which is also concerned with the administrative prohibition of 'gay propaganda', this time in Arkhangelsk. In this case, Russia once again tried to argue that this restriction fulfilled the aim of, *inter alia*, protecting public morals. Just as in *Fedotova*, the HRC rejected this claim by citing its previous observation:

> The Committee recalls its general comment No. 34, citing general comment No. 22 (1993) on the right to freedom of thought, conscience and religion in which it stated that "'the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations … for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination."[40]

Thus, unlike in *Toonen*, the HRC in *Fedotova* and *Kirill Nepomnyashchiy* has invoked the universality of human rights in order to reject Russia's public morals argument.

Overall, under the jurisprudence of the HRC, states no longer have a margin of discretion in the matter of 'public morals'. The sole claim that a measure is protecting a nation's public morals is insufficient to justify a limitation, as the HRC held that 'public morals' derive from many different traditions and must be understood in light of the universality of human

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[38] Paula Gerber and Joel Gory, 'The UN Human Rights Committee and LGBT Rights: What is it Doing? What Could it be Doing?' (2014) 14 Human Rights Law Review 403, 432: 'The decision is especially important because it effectively reverses the position taken by the Committee in *Hertzberg v Finland* […].'; Luca Paladini, 'Same-Sex Couples Before Quasi-Jurisdictional Bodies: The Case of the UN Human Rights Committee' in Daniele Gallo, Luca Paladini and Pietro Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer 2014) 543; Elizabeth K. Cassidy, 'Restricting Rights? The Public Order and Public Morality Limitations on Free Speech and Religious Liberty in UN Human Rights Institutions' (2015) 13 The Review of Faith & International Affairs 5, 10-11.

[39] *Fedotova v Russian Federation* (2012) UN Doc CCPR/C/106/D/1932/2010, para 10.5.

[40] *Kirill Nepomnyashchiy v Russian Federation* (2018) UN Doc CCPR/C/123/D/2318/2013, para 7.8.

rights. The HRC has also held that limitations based on 'public morals' must be in line with the principles of non-discrimination and pluralism. This implies that if there is a differentiation of treatment involved, a restrictive measure must be based on 'reasonable and objective' criteria in order for it to be justified as a limitation based on public morals.[41]

3. The Obscure Nature of the HRC's 'Public Morals' Jurisprudence

In developing its 'public morals' jurisprudence, the HRC has explained its reasoning in an almost passing manner.[42] As a result of this lack of deliberation, the 'public morals' jurisprudence of the HRC lacks clarity and rigor. It is unclear when public morals would qualify as deriving from many different social, philosophical, and religious traditions. The scope of the term tradition itself is rather hazy.[43] For instance, if a state invokes protection of public morals based on Islam, is there one single Islamic tradition, Sunni and Shia traditions, or Hanbali, Maliki, Shafi'i and Hanafi traditions, or does each Muslim-majority state have its own particular tradition?[44] One might also ask whether the fact that Islam is a major world religion means that such a claim would be weightier compared to the one based on Tasmanian moral tradition only.

Even if it is assumed that an act is considered to be immoral in many different social, philosophical, and religious traditions, one might still ponder on the number of traditions or the extent of the consensus needed in order to convincingly establish that the enjoyment of a right can be restricted for 'protection of public morals'. Does the statement imply that the HRC will assess whether a public moral conception is shared by major world religions and ethical philosophies? If yes, how many major world religions or ethical philosophies are needed, or does the conception have to be shared by all of them? Alternatively, if it is assumed that each state has its own tradition, is it sufficient that the 'public moral' is shared by a simple majority of states who have ratified the ICCPR, or does it require a greater majority? This issue remains unanswered by the HRC in its jurisprudence.

[41] See General Comment 18 (n 5) 28 para 13.
[42] Dominic McGoldrick, 'The Development and Status of Sexual Orientation Discrimination under International Human Rights Law' 16 Human Rights Law Review 613, 628.
[43] Neville Cox, 'Justifying Blasphemy Laws: Freedom of Expression, Public Morals, and International Human Rights Law' (2020) 35 Journal of Law and Religion 33, 47.
[44] Cf. ibid.

One might retort that the 'many different traditions' approach is comparable with the notion of 'European consensus' in the jurisprudence of the ECtHR. European consensus has been defined by Kanstantsin Dzehtsiarou as 'a general agreement among the majority of Member States (…) about certain rules and principles identified through comparative research of national and international law and practice.'[45] When the ECtHR found the existence of a European consensus in a certain subject matter, this would create what Dzehtsiarou called 'a rebuttable presumption in favor of the solution adopted by the majority of the Contracting Parties'.[46] To put it differently, European consensus can narrow the margin of appreciation accorded to a state who has not followed such a consensus.[47] As observed by Brems, '[s]ometimes, a country that is "staying behind" is sanctioned'.[48] Conversely, if the ECtHR found the lack of a European consensus, it may conclude that states enjoy a broad margin of appreciation in the particular matter.[49]

In light of this comparison, the 'many different traditions' approach can perhaps be interpreted as a form of universalistic consensus; in other words, when there is a consensus among 'many different traditions' over a certain moral issue, that consensus qualifies as 'public morals' under the ICCPR. However, the European consensus is inextricably linked to margin of appreciation, a notion which the HRC explicitly repudiated in General Comment 34.[50] Furthermore, the problem of obscurity still lingers, as it remains unclear how many different traditions are needed and what sort of tradition is qualified to establish the existence of a universalistic consensus.

As a consequence of the aforementioned problems, there is a lacuna in the public morals jurisprudence of the HRC that has created a legal uncertainty, since it is unclear when a public morals defence would be acceptable. Neville Cox has even considered the HRC's statement 'a meaningless platitude reflecting the obvious point that there are a multitude of different sources from which any individual or state might draw morality'.[51] He further added that 'if such an

[45] Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 German Law Journal 1730, 1733.
[46] Ibid.
[47] Ibid; See also *Tyrer v the United Kingdom* App no 5856/72 (ECHR, 25 April 1978) para 31; *Marckx v Belgium* App no 6833/74 (ECHR, 13 June 1979) para 41; *Bayatyan v Armenia* App no 23459/03 [GC] (ECHR, 7 July 2011) para 102.
[48] Eva Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) 56 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 240, 279.
[49] Fiona de Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave Macmillan 2018) 79-90. See also *Schalk and Kopf v Austria* App no 30141/04 (ECHR, 24 June 2010) para 58; *Stübing v Germany* App no 43547/08 (ECHR, 12 April 2012) para 61.
[50] General Comment 34 (n 10) para 36.
[51] Cox (n 43) 47.

evaluation of overarching moral legitimacy were to have meaning, then it would need to be made by reference to some clear, universally applicable moral yardstick—but none is available.'[52]

4. Public Morals and the VCLT

The term 'public morals' can be found in five different provisions of the ICCPR, namely Article 12(3) regarding restrictions on the right to liberty of movement and freedom to choose one's residence, Article 18(3) regarding the right to manifest one's religion, Article 19(3) concerning the exercise of the right to freedom of expression, Article 21 regarding the exercise of the right to peaceful assembly, and Article 22(2) regarding the right to freedom of association.[53] Furthermore, according to Article 14(1), the presence of media and public at a trial can be limited for 'reasons of morals', although this particular provision does not employ the adjective 'public'.[54] As a comparison, in the French text, there are three terms that are used.[55] Article 18(3) employs the word 'morale', whereas Articles 12(3), 19(3), 21, and 22(2) enshrine the term 'moralité publique'. Meanwhile, Article 14(1) uses the term 'bonnes moeurs' instead of 'reasons of morals'.[56]

Under international law, the general rule to interpret these provisions is laid down in the VCLT. According to Article 31(1) of the VCLT, '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[57] As explained by Oliver Dörr, this rule 'sets the stage for a single combined operation taking account of all named elements simultaneously'.[58] The VCLT then further stipulated under Article 31(2) that the term 'context' shall include, among others, the treaty's text, its preamble, and its annexes.[59]

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[52] Ibid.
[53] ICCPR (n 2).
[54] Ibid.
[55] Pacte international relatif aux droits civils et politiques (*Haut-Commissariat des Nations unies aux droits de l'homme*) <www.ohchr.org/fr/professionalinterest/pages/ccpr.aspx> accessed 11 March 2021.
[56] Ibid.
[57] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
[58] Oliver Dörr, 'Section 3: Application of Treaties' in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2012) 580.
[59] VCLT (n 57).

For the purpose of this Section, among the different provisions which contain the term 'public morals' or 'morals', I focus on Article 19(3) on limitation to the right of freedom of expression as a case study. The following is the provision quoted in full:

> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of **public** health or **morals**.[60]

This article is selected as an illustration, as the other limitation clauses are largely similar to this one (with the notable exception of Article 14(1)).

First, I shall start with the ordinary meaning of the term 'morals'. English language dictionaries define the term 'morals' as standards of whether a behaviour is good or bad, right or wrong.[61] Another term that is often used interchangeably, 'morality', seems to have a very similar meaning; Cambridge Dictionary defines it as 'a set of personal or social standards for good or bad behaviour and character' or 'the quality of being right, honest, or acceptable',[62] while Oxford Dictionaries Online construes the term as '[p]rinciples concerning the distinction between right and wrong or good and bad behaviour'.[63] Nevertheless, the term 'morality' seems to have a more meta scope: as explained by Merriam-Webster Dictionary, 'morality' may also refer to 'a doctrine or system of moral conduct'.[64]

None of these general dictionaries contain an entry for the term 'public morals' or 'public morality'. Instead, a more specialised meaning of 'public morals' can be found in the Oxford Dictionary of Law, which defines it as '[t]he basic moral structure of society.'[65] The same dictionary also defines the phrase 'corruption of public morals' as '[c]onduct "destructive

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[60] ICCPR (n 2) art 19(3), emphasis added.

[61] 'moral' (*Cambridge Dictionary*) <dictionary.cambridge.org/dictionary/english/moral> accessed 11 March 2021: 'standards for good or bad character and behavior'; 'moral' (*Lexico*) <www.lexico.com/definition/moral> accessed 11 March 2021: 'Standards of behaviour; principles of right and wrong'. 'moral' (*Merriam-Webster*) <www.merriam-webster.com/dictionary/morals> accessed 11 March 2021: 'moral practices or teachings: modes of conduct', 'ethics'. As a note, according to Cambridge Dictionary, the term 'moral' can also mean 'expressing or teaching a conception of right behavior'. In this light, the term 'public morals' can be construed as public articulation of a conception of right behaviour.

[62] 'morality' (*Cambridge Dictionary*) <dictionary.cambridge.org/dictionary/english/morality> accessed 11 March 2021.

[63] 'morality' (*Lexico*) <www.lexico.com/definition/morality> accessed 11 March 2021.

[64] 'morality' (*Merriam-Webster*) <merriam-webster.com/dictionary/morality> accessed 11 March 2021.

[65] Elizabeth A. Martin (ed), *Oxford Dictionary of Law* (5th edn, Oxford University Press 2003) 396.

of the [moral] fabric of society".'[66] These definitions imply that 'public morals' or 'public morality' have a different scope when compared with 'morals' and 'morality', as the former only refers to the fundamental moral structure of *society in general*, whereas the latter may also include the 'private' moral structure of individuals or certain groups that might not necessarily be shared by a majority in a society.

The same conclusion can be reached by inferring the ordinary meanings of the terms 'public' and 'morals' individually. The term 'public' is defined by Cambridge Dictionary as 'relating to or involving people in general, rather than being limited to a particular group of people.'[67] Similar meaning can also be found in other English language dictionaries such as Merriam-Webster and Oxford Dictionaries Online.[68] Combined with the dictionary definition of 'morals', it implies standards of right or wrong, good or bad that are shared by a society or people in general instead of being restricted to a certain group or private individuals.[69]

In the French language, the definition of *morale* seems to resemble both morals and morality in English. According to Larousse Dictionary, *morale* means '[e]nsemble de règles de conduite, considérées comme bonnes de façon absolue ou découlant d'une certaine conception de la vie'.[70] As for *moralité*, the same dictionary defined it differently as '[r]apport, conformité à la morale, à l'éthique'.[71] Nevertheless, as in the English language, the two terms are still linked to each other.

Meanwhile, the term *mœurs* in Article 14(1) seems to have a similar meaning with 'morals' in the English text, as one of the definitions of the term in the Larousse Dictionary includes '[c]onduites individuelles, en particulier sur le plan sexuel, considérées par rapport à ces règles'.[72] Based on this definition, *bonnes mœurs* would refer to accepted individual conducts.[73] At the same time, the phrase *bonnes moeurs* seems to be related to the Latin term

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[66] Ibid 121.
[67] 'public' (*Cambridge Dictionary*) <dictionary.cambridge.org/dictionary/english/public> accessed 11 March 2021.
[68] 'public' (*Merriam-Webster*) <www.merriam-webster.com/dictionary/public> accessed 11 March 2021; 'public' (*Lexico*) <www.lexico.com/definition/public> accessed 11 March 2021.
[69] Cf. the approach of the WTO Panel in *US – Gambling*, although it should be noted that the Panel was trying to interpret 'public morals' exception in Article XIV(a) of the GATS and Article XX(a) GATT. It consulted the dictionary meanings of the term 'public' and 'morals', and concluded that it 'denotes standards of right and wrong conduct maintained by or on behalf of a community or nation'. See WTO, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (10 November 2004) WT/DS285/R (*US – Gambling*), para 6.459-6.465.
[70] 'morale' (*Larousse*) <www.larousse.fr/dictionnaires/francais/morale/52564> accessed 11 March 2021.
[71] 'moralité' (*Larousse*) <www.larousse.fr/dictionnaires/francais/moralité/52575> accessed 11 March 2021.
[72] See 'mœurs' (*Larousse*) <www.larousse.fr/dictionnaires/francais/mœurs/51995> accessed 11 March 2021, although the term also has other meanings that is comparable to customs or mores in English.
[73] Cf 'mœurs' (*Larousse*) <larousse.fr/dictionnaires/francais-anglais/mœurs/51871> accessed 11 March 2021, in

contra bonos mores, which is translated by the Oxford Dictionary of Law as 'against good morals'.[74]

Ordinary meaning alone, however, is not sufficient to interpret the term 'public morals', and one also needs to examine the context of the provision and the object and purpose of the treaty. With regard to the context, 'protection of public morals' constitutes one of the permissible grounds to limit various rights of the ICCPR together with, for instance, 'protection of public order' or 'public health'. This context implies that each limitation ground needs to be interpreted without rendering the other limitation grounds redundant.[75] It is true that 'public morals' may have overlaps with other legitimate aims such as 'public order' or 'public health'. As an illustration, states might argue that measures against prostitution are intended for protection of public order, public health, and/or public morals. Measures against underage gambling might also be considered as satisfying the aim of protecting public order and/or public morals.[76] In a conservative society, the perceived failure of the state to combat prostitution and gambling could even lead to attacks by vigilante groups, which could bring public disorder. Despite its possible overlaps with other limitation grounds, 'public morals' must not be construed to the extent that it does not have its own independent existence.

When 'public morals' is understood in light of this context, it implies that the term is inherently concerned with *prescriptive* instead of *descriptive* matters. The reason is that if an examination of 'public morals' is delving into the establishment of 'objective facts' such as the existence of 'harm' or 'health', the matter is already concerned with other grounds of limitation, namely protection of public order, public health or protection of the rights of others. Furthermore, the ordinary meaning combined with the context also indicates that the term is inherently *subjective* in the sense that it is concerned with the particular judgment of whether an act is right or wrong irrespective of what others believe.[77] This is to be contrasted with, for instance, public order and health, as the existence of 'order' or 'health' does not depend on the belief system of someone. These prescriptive and subjective elements are what give 'public morals' its own unique and independent existence as a ground of limitation.

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which the sentence 'c'est contraire aux bonnes mœurs' is translated into 'it goes against accepted standards of behavior'.

[74] Martin (n 65) 114. See also 'contra bonos mores' (Merriam-Webster) <www.merriam-webster.com/legal/contra%20bonos%20mores> accessed 11 March 2021.

[75] Cf. Jeremy C. Marwell, 'Trade and Morality: The WTO Public Morals Exception after Gambling' (2006) 81 New York University Law Review 802, 823.

[76] Cf. *US – Gambling* (n 69) para 6.466-6.468.

[77] Cox (n 43) 48.

Another relevant context to interpret 'public morals' is the use of the qualifier 'public' not only for this legitimate aim, but also for 'public health' and 'public order'. This adjective implies that the scope of these terms includes the order or health of a society or a people in general instead of individual or global health or order. As a result, it would be absurd to accept a 'protection of public order' or 'public health' defence based on one society or people's circumstances or context while denying it for 'protection of public morals' despite the fact that these terms all employ the same adjective.

As for the object and purpose of the ICCPR, the HRC has held that:

> The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.[78]

In this regard, one might argue that the telos of providing 'an efficacious supervisory machinery for the obligations undertaken' indicates that 'public morals' must be construed in a universalistic manner, as concluding otherwise could, in the words of the HRC in *Toonen*, 'open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes […].'[79] However, such a conclusion would constitute a slippery slope. Not defining 'public morals' in a universalistic manner does not imply that the HRC's supervisory competence will be negated, nor does it mean that the state's public morals defence will automatically be accepted. In this regard, states still have to prove that the measure is necessary and proportionate.

Furthermore, as observed by the Iran-US Claims Tribunal, 'a treaty's object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text.'[80] In other words, object and purpose cannot be used to infer an interpretation that is not contained in the ordinary meaning of the text.[81] Since the ordinary meaning of the term 'public morals' refer to standards of right or wrong of a society or people in general instead of globally, the telos of providing 'an efficacious supervisory machinery' cannot be used to replace the ordinary meaning in favour of a universalistic one.

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[78] HRC, 'General Comment 24: General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant' (1994) UN Doc CCPR/C/21/Rev.1/Add.6, para 7.
[79] *Toonen v Australia* (n 4) para 8.6.
[80] *The United States of America and the Federal Reserve Bank of New York v the Islamic Republic of Iran and Bank Markazi Iran* (2000) 36 Iran-USCTR 5, para 58.
[81] Dörr (n 58) 586-87.

Overall, when the ordinary meaning of 'public morals' in Article 19(3) is assessed in light of its context and the ICCPR's object and purpose, the term refers to standards of what a society or people considers to be right or wrong. This term is also inherently subjective in the sense that what matters is only the moral judgment of a society or people in general irrespective of what other societies believe to be right. These imply that the HRC's reading that 'public morals' must derive from many different traditions is not supported by the VCLT.[82] Instead, the application of the general rule of interpretation indicates that the content of 'public morals' may vary depending on the society concerned; what the Kikuyu society of Kenya considers to be right will differ from the moral standards of the Toraja society of South Sulawesi.[83] It should be noted, however, that this finding does not hint towards a wide margin of appreciation for states in interpreting the requirement of 'public morals' and in assessing the necessity of a public morals measure. Wide margin implies the lack of strict scrutiny from a human rights body, whereas states who invoked that ground still have the onus to demonstrate not only that a certain moral belief is really followed by its society or people in general, but also that the measure taken fulfils the necessity criterion.

This resulting interpretation might still leave some matters obscure. It is still unclear how one should define society or people. In this regard, one might ask to what extent a moral standard has to be shared by a certain number of people in order to be considered as 'public morals'. Is the majority of a state's population required, or is it satisfactory that the moral standard is found among a certain ethnicity or religion? One might also ponder whether the fact that the defence is invoked by a state representative is sufficient to establish that a limitation serves the legitimate aim of protecting public morals, since, as observed by Eva Brems, '[w]hen controversial moral issues are at stake, on which divergent opinions exist within a particular society, the government's interpretation of the moral values or other tendencies in society represents only one side in the debate.'[84]

Under Article 32 of the VCLT, recourse to supplementary means of interpretation such as preparatory works may be made 'in order to confirm the meaning resulting from the

[82] Furthermore, one can also argue that it is not in line with actual state practice. As observed by Neville Cox, for many states, 'morality is about what *they* see as right and wrong, not a basket containing the answers that *other* traditions or societies give to these complex questions.' He also argued that in many states, public morality '*does* derive exclusively or largely from a religious tradition—be it Islam generally or one branch of Islam specifically—and denies the possibility that moral truth can be found anywhere but in God.' See Cox (n 43) 47.

[83] Cf. The Panel's conclusion that the content of 'public morals' under the GATS 'can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values'. See *US – Gambling* (n 69) para 6.461.

[84] Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers 2001) 382.

application' of Article 31 or when the application of the general rule of interpretation under Article 31 'leaves the meaning ambiguous or obscure', or 'leads to a result which is manifestly absurd or unreasonable'.[85] However, the preparatory works of the ICCPR did not discuss the 'public morals' requirement in details.[86]

Meanwhile, the preparatory works of the Universal Declaration of Human Rights (UDHR) as the foundation of international human rights law did demonstrate that the term 'morality' together with 'public order' as grounds of limitation were first inserted in the UDHR to complement 'general welfare'. The reason was because in the French language, both morality (*la morale*) and public order (*l'ordre publique*) were not encapsulated by the term general welfare (*bien-être general*), which is only concerned with economic and social matters.[87] Nevertheless, as concluded by Anna-Lena Svensson-McCarthy, the inclusion of the term 'morality' in the UDHR 'was not intended to add anything in substance that was not, in principle, already contained in the expression "general welfare" as understood by English law.'[88] This implies that this supplementary means of implementation is also unhelpful in shedding light into the obscure aspect of 'public morals' under the ICCPR.

As a result, while the term 'public morals' does refer to subjective standards of what a society or people in general believes to be right or wrong, the ICCPR seems to leave open the question of how to establish that a measure serves the legitimate aim of protecting public morals. Nevertheless, limitation of rights remains *an exception* instead of a general rule, and consequently the burden is still on the part of the invoking state to prove that its measure really has the aim of protecting public morals.

5. Public Morals: Unfettered Discretion?

If 'public morals' is defined as the subjective standard of right or wrong of a society or people in general, it might raise some concerns that it could lead to unfettered discretion that would excuse many violations. Gehan Gunatilleke, for instance, argued that allowing states to define

[85] VCLT (n 57) art 32.
[86] Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (Kluwer Law International 1998) 152-59; Leonard Hammer, *The International Human Right to Freedom of Conscience: Some Suggestions for Its Development and Application* (Routledge 2002).
[87] Commission on Human Rights, 'Summary Record of the Seventy-Fourth Meeting' (1948) UN Doc E/CN.4/SR.74, 11-12. See also Svensson-McCarthy (n 86) 149-50.
[88] Svensson-McCarthy (n 86) 151.

'public morals' would grant them 'near carte blanche'.[89] Moreover, in the jurisprudence of the HRC, all the cases in which the Committee had assessed the public morals defence are concerned with LGBT rights. Indeed, states have regularly invoked 'morals' to justify criminalisation of homosexual acts at international human rights forums such as the Universal Periodic Review and the periodic state reporting procedure of the HRC.[90] Consequently, one might argue that the HRC's approach is warranted to protect minorities from discrimination and to ensure that 'public morals' will not undercut pluralism.

In order to assuage these fears, the HRC should apply a robust necessity test.[91] As observed by the HRC, this test implies that restrictive measures 'must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.' [92] Furthermore, the principle of proportionality needs to be implemented not only in the legislation, but also in the implementing measures by administrative and judicial authorities.[93]

One might retort to this point by asserting that, as held by Gunatilleke, the necessity requirement 'may become easily surmountable' in the context of public morals, 'as the state could define what the limitation is necessary for.'[94] Such an assumption, however, is made too hastily, as it presumed that necessity would automatically be satisfied if a measure is deemed to have a legitimate aim. It also wrongly assumes that states would be granted a wide (or even unfettered) margin of appreciation in establishing the necessity of a measure.

As an illustration, states have relied on 'public morals' to defend criminalisation of homosexual acts and administrative prohibition of 'gay propaganda'. In this regard, invocation of 'protection of public morals' alone is insufficient to justify the legality of the measure. Instead, the onus is still on the state to prove that the criterion of 'necessity' is fulfilled. This in

[89] Gehan Gunatilleke, 'Criteria and Constraints: The Human Rights Committee's Test on Limiting the Freedom of Religion or Belief' (2020) 15 Religion & Human Rights 20, 25.
[90] See, for instance, United Nations Human Rights Council (UNHRC), 'Report of the Working Group on the Universal Periodic Review: Jamaica' (2011) UN Doc A/HRC/16/14, para 32; UNHRC, 'Report of the Working Group on the Universal Periodic Review - Cameroon – Addendum' (2009) UN Doc A/HRC/11/21/Add.1, 6; HRC, 'Replies from the Government of Ethiopia to the List of Issues (CCPR/C/ETH/Q/1) to be Taken Up in Connection with the Consideration of the Second Periodic Report of Ethiopia (CCPR/C/ETH/1)' (2011) UN Doc CCPR/C/ETH/Q/1/Add.1, para 25; HRC, 'Replies of Algeria to the List of Issues' (2018) UN Doc CCPR/C/DZA/Q/4/Add.1, para 37.
[91] Cox (n 43) 48-49.
[92] See HRC, 'General Comment 27: Freedom of Movement (Article 12)' (1999) UN Doc CCPR/C/21/Rev.1/Add.9, para 14; HRC, 'General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 6; General Comment 34 (n 10) para 34-36.
[93] General Comment 27 (n 92) para 15.
[94] Gunatilleke (n 89) 25.

itself would be arduous to achieve, as the coercive power of the law is not the only measure that can be pursued by the state to 'protect public morals'. As observed by Christopher F. Mooney:

> When faced with what it considers a social evil, (…) a legislature must ask whether coercive law is the best means to eradicate it. It may be that law will have to be tolerant of this particular vice which morality condemns, leaving its alleviation to other institutions, such as church, home, school or civic organizations, all of which are concerned with the maintenance of moral standards.[95]

Joel Feinberg also raised a similar argument against the use of legal enforcement to protect public morals:

> (…) legal enforcement is hardly required to preserve some parts of the status quo whose change would be on balance evil. The entrenched majority has great advantages in the free competition of life-styles even without the help of the state. Merely social pressures to conform to those traditional norms that are thought to be indispensable by the great majority will be difficult to resist and the norms themselves highly resistant to erosion.[96]

In other words, the necessity of criminalisation or administrative prohibition can be brought into question by asking why should the state resort to the coercive power of the law to protect public morals, particularly when legal enforcement is utterly redundant and when there are less intrusive means available? Consequently, even when a state managed to prove that its society or people in general do not approve of homosexuality, this does not imply complete deference to domestic authorities. Instead, the prevailing presumption remains that restrictions based on protection of public morals are an exception and violate the ICCPR, and that the onus is on the state to rebut this presumption by demonstrating the necessity of the measure.

Furthermore, in order to ensure that public morals are not abused to discriminate against minorities and undercut pluralism, the HRC should also assert that this limitation ground must always be read in light of Article 2(1) of the ICCPR, which reads '[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind […].'[97] For instance, administrative prohibition of 'gay propaganda' embodies what the ECtHR has called 'predisposed bias on the part of a heterosexual majority against a homosexual minority'.[98] When states try to defend this measure by invoking public morals, the HRC can reject this under the ground that the measure is inherently discriminatory. While the

[95] Christopher F. Mooney, 'Public Morality and Law' (1983) 1 Journal of Law and Religion 45, 46.
[96] Feinberg (n 7) 66.
[97] ICCPR (n 2) art 2(1).
[98] *Bayev and Others v Russia* App nos 67667/09, 44092/12, and 56717/12 (ECHR, 20 June 2017), para 68.

HRC has already held that 'public morals' must always be understood in light of the principle of non-discrimination,[99] it should make the legal basis of this statement explicit by referring to Article 2(1).

In fact, the HRC should take a step further by establishing the requirement that *all* limitation grounds must always be read in light of Article 2(1) of the ICCPR. The reason is that states might not only resort to 'public morals' to defend discriminatory measures; they can, for instance, invoke 'public order' to justify a blasphemy law against the Ahmadi minority in a Muslim-majority country for the purported goal of preventing social backlash against an unpopular minority.[100] Such a requirement can serve as a safety brake to ensure that the limitation ground would not be misappropriated for discriminatory purposes. Unlike the unsubstantiated 'many different traditions' approach, this reading can be justified by a reference to the text of the ICCPR.

6. Conclusion

This research has found that from a legal positivist perspective, public morals do not have to derive from many different traditions, and that they may be inferred exclusively from one society or people's subjective standards of right and wrong. In other words, the term 'public morals' does not imply universalistic morals. While it remains unclear when a moral standard can fall under the heading of 'public morals', the onus is still on the state to prove that restrictions based on protection of public morals fulfil this legitimate aim and are necessary and proportionate to the aim sought. Merely invoking 'protection of public morals' would not grant the state a carte blanche to crack a nut with a sledgehammer, nor will it shield measures that are inherently discriminatory.

This research has also found that the HRC public morals jurisprudence is not only obscure, but also lacks the necessary underpinnings under international law, as the application of the general rule of interpretation does not support the claim of the HRC that 'public morals' must be derived from many different traditions. These issues could have potential repercussions on the legitimacy of the HRC as the treaty body of the ICCPR, since states would be less willing to follow the HRC's jurisprudence if it remains un-rigorous and not supported by a strong legal

[99] General Comment 34 (n 10) para 32.
[100] Cf. Decision of the Indonesian Constitutional Court No. 140/PUU-VII/2009. See also Melissa A. Crouch, 'Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law' (2012) 7 Asian Journal of Comparative Law 1.

basis. For this reason, it is hoped that in the future the HRC would endeavour to provide strong legal or normative reasons for how it reached a certain interpretation.